IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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I.

QUESTION PRESENTED

Whether union inducement of employees of motor carriers not to handle freight of other struck or unfair employers pursuant to an agreement between the union and such motor carriers that the latters' employees "shall not be allowed to handle or haul freight to or from an unfair company" constitutes a violation of the secondary boycott provisions of Section 8(b)(4)(A) of the National Labor Relations Act.

II

ARGUMENT

The Board (four members thereof), in this and similar cases involving the use of the so-called "hot cargo" clause, has specifically affirmed the validity of such clauses under the Act and the right of employers and unions to negotiate concerning them, but nevertheless the Board (two members dissenting) here asserts that the union parties to such clauses cannot seek to enforce them according to their terms by requesting their members, when the occasion arises, to refrain from handling freight from struck or unfair employers, at least where the employer parties to such agreements desire to repudiate them, and perhaps (as here in the case of Leeway) even when they do not. For a Board that has been set up by Congress under an Act designed to promote the establishment (Sec. 1 and Sec. 7 of the Act) and the stability (Sec. 301 of the Act) of the collective bargaining process, the foregoing proposition would appear untenable on its face, encouraging as it does the willful disregard by employers of solemn and admittedly lawful commitments made in the give and take of across-the-table bargaining. Accordingly, for reasons which will be briefly summarized hereafter, and in view of the strong opinions repudiating the Board's views rendered by the court below and by the Court of Appeals for the Second Circuit in *Milk Drivers and Dairy Employees Local Union 338 v. National Labor Relations Board*, decided June 19, 1957, 40 LRRM 2279—opinions far overshadowing in logic and reasoning the conflicting decision of the Ninth Circuit in *National Labor Relations Board v. Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147—it is respectfully submitted that there is no reason for extended consideration by this Court of the Board's decision in this and similar cases involving the question of the enforceability of the "hot cargo" clause, and that the Board's petition

herein should, along with the union's petition in the Local 1976 case, *supra*, (No. 999, October 1956 Term), be disposed of in a per curiam decision affirming the decision of the Circuit below and that of the Second Circuit in the Local 338 case.

Without attempting detailed argument, respondent tenders the following considerations in answer to the Board's current position respecting the enforceability of "hot cargo" agreements.

1. The legislative history as well as the language of Section 8(b)(4)(A) make it entirely clear that the Congress had no intention either of outlawing "hot cargo" agreements in their entirety or of denying their enforceability. Use of such agreements was common practice in major segments of American industry for many years prior to Taft-Hartley and, indeed, prior to the Wagner Act. Almost since the earliest days of organized labor it has been customary for sympathetic employers to cooperate with unions engaged in labor disputes by refusing to deal with other employers involved in such disputes. Such cooperation was extended, sometimes voluntarily, at other times upon union request, and at still other times as a result of previous agreements, but in all cases the employer was motivated to extend such cooperation by one or more of the following considerations (set forth by the Board in its brief before the Second Circuit in *Rabouin d/b/a Conway's Express v. National Labor Relations Board*, 195 F. 2d 906): "He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive practices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause."

Had Congress wished to outlaw or stultify the traditional "hot cargo" agreement, it could easily have done so by ex-

press language, as it did in the case of the "closed-shop" agreement proscribed under the provisions of Section 8(a)(3); that there is no specific language of proscription in respect to "hot cargo" is significant. Furthermore, the bare language of Section 8(b) (4) (A) operates to proscribe only such involvement of neutrals in the disputes of others as has been *involuntarily* induced by actual *strike* action, not voluntary involvement, and not even involvement that has been caused by threat of strike directed to the neutral employer as distinguished from his employees. As noted by the Second Circuit in *Conway Express, supra*, Congress, during the discussions preceding the passage of Taft-Hartley, expressly rejected a proposal that would have outlawed involvement of neutrals induced by threat of strike, and the Board and the courts have consistently ruled that the proscriptions of Section 8(b (4) (A) do not reach such threats and that unions are free to seek to induce neutral employers to aid a union's cause by refusing to handle unfair or struck goods by any and all means other than inducement of the neutral's employees to strike.[1]

A final and most conclusive indication of Congressional intent respecting the validity and enforceability of "hot cargo" agreements lies in the fact that both in 1954 and in 1956 Congress expressly rejected attempts to outlaw or restrict the use of "hot cargo" agreements. (Cong. Rec. May 6, 1954, p. 579, and S. 3842 introduced by Senator Curtis of Nebraska, May 14, 1956, 84th Cong. 2d Sess.). *Cf. United States v. International Boxing Club*, 348 U. S. 236, 244.

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[1] *Sealright Pacific, Ltd.*, 82 NLRB 271; *Lewis Karlton d/b/a Consolidated Frame Company*, 91 NLRB 1295; *Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.)*, 92 NLRB 255; *Schatte* v. *International Alliance*, 182 F. 2d 158 (C.A. 9), cert. denied 340 U.S. 827; *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906; *N.L.R.B.* v. *Electrical Workers, CIO*, 228 F. 2d 553 (C.A. 2), decided December 22, 1955.

The foregoing considerations also serve to refute the Board's contention that the Congress was concerned with protecting not only the neutral employer against so-called "secondary" activities and involvement in the disputes of others, but also with protecting the interests of the general public. The legislative history indicates that Congress was concerned only with innocent third party neutrals and undertook to protect *only* the employer who was being involuntarily drawn into the labor disputes of other employers with which the neutral had no concern through means of union-induced strikes of the neutral's employees.[2]

If indeed, as argued by the Board, it was the purpose of Congress to protect the general public as well as the third party neutrals from the secondary boycott disruptions, why did Congress vote down provisions of the House bill which would have made it unlawful for unions to cause such disruptions by threats of a strike directed against a neutral employer himself? Why did Congress leave unions free to attempt to induce customers of neutral employers to boycott the neutral for the purpose of forcing the neutral to stop dealing with the primary employer? *Brewery & Beverage Drivers v. N.L.R.B. (Washington Coca-Cola* case), 95 U. S. App. D. C. 117, 220 F. 2d 380. Why did not Congress interdict the voluntary as well as the involuntary refusal on the part of neutrals to deal or do business with other employers engaged in separate labor disputes? Surely, the failure of Congress to take preventive measures in these situations does not reveal the broad concern with the public interest contended for by the Board. As far as the public is concerned, the flow of commerce between

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[2] See 93 Cong. Rec. 3834, 2 Leg. Hist., 1005-1006; 93 Cong. Rec. 6445-6446 in 2 Leg. Hist. 1544; 93 Cong. Rec. 4199, 2 Leg. Hist. 1107, 1108; 93 Cong. Rec. 4322 (April 29, 1947); House Report No. 245 on H.R. 3020, 80th Congress, 1st Sess., p. 23; Senate Report No. 105 on S. 1126, supplemental views, p. 54, 1 Leg. Hist. 540; 93 Cong. Rec. A1295.

the neutral and the primary employer is disrupted to exactly the same extent whenever the neutral ceases to do business with the primary employer, whatever the reason for the neutral's cessation may be.[3]

2. In addition to the entire lack of any evidence of legislative intent to proscribe the "hot cargo" agreement or its use, it is clear, as found by both the court below and the Second Circuit in the Local 338 case, *supra*, that certain necessary prerequisites to the application of Section 8(b)(4)(A) cannot be met when a neutral's involvement in the disputes of others is brought about through operation of the "hot cargo" clause. The facts of the present case indicate that three major elements of Section 8(b)(4)(A) application are absent:

(a) Section 8(b)(4)(A) proscribes only a strike or partial strike or other act of insubordination or refusal to perform work in the nature of a strike or partial strike as a means of causing the carriers to stop doing business with *American Iron;* that section does not proscribe *any* mere refusal to perform work which may lead to that result. It can hardly be said in the present case that a strike or partial strike took place in view of the fact that the carriers had not only consented in advance that their employees need not handle the "struck goods" but, further, had pledged that they shall not be *allowed* to handle such goods.

(b) Section 8(b)(4)(A) requires that any refusal to work shall take place in the course of the employee's employment. Since the "struck goods" agreement in the present case expressly takes the unloading of American Iron

[3] A further pertinent inquiry in this area involves the question of what happens to the Board's position in view of the recent determination of this Court in *General Electric Co.* v. *U.E.*, No. 276, decided June 3, 1957. Under that decision it would appear that since, by the Board's own pronouncement, the "hot cargo" clause is valid on its face, the union party thereto is free to invoke Section 301 of the Act in support of a decree of specific performance.

trucks out of the area of employment and removes those particular services from the scope of services which are regularly performed or which the employer could reasonably expect his employees to perform, it cannot be said that the "refusal" in the present case was made in the course of the carriers' employees' employment, so that a second element of Section 8(b)(4)(A) is not present.

(c) Section 8(b)(4)(A) requires that the proscribed activity must constitute a *forcing* of a neutral to cease doing business with some other employer, and that a specific object of the union's acts of encouragement is to obtain that result. *Cf. N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, at 687. Here, however, it cannot be said that any action of the Drivers' Union *forced* the carriers to refrain from doing business with American Iron for the reason that the carriers under their "struck goods" agreement had expressly agreed so to refrain in advance.

CONCLUSION

As stated by the Second Circuit in *Rabouin* v. *N.L.R.B.*, 195 F. 2d at 912:

> ". . . in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously."

It is respectfully submitted that both the language and the legislative history of Section 8(b)(4)(A) of the Act support the conclusion of the court below and of the Second Circuit in the *Local 338* case, *supra*, that that section was not intended either to outlaw or limit the enforceability of the traditional "hot cargo" clause, and that the decisions of those courts should be affirmed.

Respectfully submitted,

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